No. 01-571

In the Supreme Court of the United States

JONATHAN M. TAMPICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the prohibition of any visual depiction that "appears to be[] of a minor engaging in sexually explicit conduct" in the Child Pornography Prevention Act of 1996, 18 U.S.C. 2252A, 2256(8)(B) (Supp. V. 1999), violates the First Amendment.

2. Whether *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), should be overruled.

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OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-17) is unpublished, but the judgment is noted at 265 F.3d 1059 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2001. The petition for a writ of certiorari was filed on October 3, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts sworn to by petitioner, Trial Tr. 36-37, and on the unchallenged testimony of an FBI agent, *id.* at 45, petitioner was convicted in the United States District Court for the

Southern District of Texas of one count of possessing material involving the sexual exploitation of minors—namely, three or more books, magazines, periodicals, films, video tapes or other matter which contain any visual depiction that has been mailed, shipped, or transported in interstate commerce, if the producing of the visual depiction involves the use of a minor engaging in sexually explicit conduct and the visual depiction is of such conduct, in violation of 18 U.S.C. 2252(a)(4)(B) (Supp. V 1999) (count 1);[1] one count of receiving materials containing child pornography that have been mailed, shipped, or transported in interstate commerce, in violation of 18 U.S.C. 2252A(a)(2) (Supp. V 1999) (count 2); and one count of distributing materials containing child pornography that have been mailed, shipped, or transported in interstate commerce, in violation of 18 U.S.C. 2252A(a)(2) (Supp. V 1999) (count 3).[2] He was sentenced to concurrent prison terms of 60 months on count 1 and 360 months on counts 2 and 3, to be followed by five years of supervised release. He was also ordered to pay a $5000 fine. Pet. 3. The court of appeals affirmed. Pet. App. 1-17.

1. In 1989, about ten years before the conviction at issue here, petitioner was convicted by the State of California of sexually molesting a boy under the age of 14 years, and was sentenced to six years in prison. In October 1992, he was released on the condition that he

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[1] 18 U.S.C. 2252(a)(4)(B) (Supp. V 1999) has since been amended to prohibit the possession of *one* (as opposed to *three*) or more such materials. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 203(a)(1), 112 Stat. 2974.

[2] Petitioner was acquitted of reproducing child pornography for distribution, in violation of 18 U.S.C. 2252A(a)(3) (Supp. V 1999) (count 4). Pet. 3.

not possess child pornography. On September 12, 1995, his parole was revoked after police found a large volume of child pornography at his residence. On February 23, 1996, he was released again, when California police discovered that he had discharged his parole. He moved to Texas without informing either the California or Texas authorities of his new address. A television broadcast of the show "America's Most Wanted" on July 11, 1998, led to his arrest in Texas. Pet. App. 2; Gov't C.A. Br. 4-6.

After arresting petitioner, authorities seized from his residence and storage shed a large quantity of child pornography that he had brought with him from California by U-Haul. Two people—Jerome Ciolino, with whom petitioner was living, and Donald Sandberg, who had obtained child pornography from petitioner—gave statements implicating petitioner in offenses relating to child pornography. Pet. App. 2; Trial Tr. 14, 16-25, 39-44, 49; Gov't C.A. Br. 6-8.

Most of the child pornography was "hard core" (PSR Add. 9-10 para. 27; see also descriptions of specific images at PSR 3-4 para. 7, accepted by district court at Sent. Tr. 7). There were depictions of "hundreds of individual children" (PSR Add. 16 para. 52), at least one of whom could be identified (PSR 8 para. 33, 9 para. 39; Sent. Tr. 26-27, 35). The sheer number of children involved made it "complete[ly] impossib[le]" to identify them all. Sent. Tr. 35; see also *id.* at 36. The depictions were on videotapes (including videotapes of actual minors, see PSR 6-7 paras. 24-25, PSR Add. 10 para. 29); photographs (including photographs of actual minors, see Trial Tr. 17, 25, 27, 29, 42 and Sent. Tr. 27-28, 30, 35; see also PSR 4 para. 7 (referring to "[h]undreds of Polaroids" of children), 4 para. 9 (identifying two children depicted), 12 paras. 60-61, PSR Add. 8-9

para. 23(B) ("original photographs"), 6 paras. 14(A) and 14(B) (photographs of children in bondage), 10 para. 29); slides (Sent. Tr. 27; PSR 6 paras. 22-23; PSR Add. 10 para. 29); 8 and 16 millimeter films (PSR 4 para. 7); and petitioner's computer hard drive and disks (including an image of an identified child exposing his genitals, see Sent. Tr. 31, PSR 6 para. 23, PSR Add. 6 para. 16, and an image of a boy in bondage who also appeared in original Polaroid photographs, see Sent. Tr. 30-31, PSR 8 para. 32).

2. Petitioner was indicted in four counts for, respectively, possessing material containing visual depictions the production of which involved the use of a minor engaged in sexually explicit conduct, receiving materials containing child pornography, distributing materials containing child pornography, and reproducing child pornography for distribution. A fifth count concerned forfeiture of his property under 18 U.S.C. 2253. The Child Pornography Prevention Act of 1996 (CPPA) defines child pornography to include any visual depiction, the production of which "involves the use of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(A) (Supp. V 1999), as well as any visual depiction, including any "computer or computer-generated image or picture," that is "or appears to be" of a minor engaging in sexually explicit conduct, 18 U.S.C. 2256(8)(B) (Supp. V 1999).[3]

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[3] The CPPA also defines child pornography to include any visual depiction "advertised, promoted, presented, described, or distributed" in a manner "that conveys the impression that the material * * * contains a visual depiction of a minor engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(D) (Supp. V 1999), and any visual depiction "created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct," 18 U.S.C. 2256(8)(C) (Supp. V 1999).

Petitioner moved to dismiss the indictment on the ground that, insofar as 18 U.S.C. 2256(8)(B) (Supp. V 1999) prohibited visual depictions that "appear[] to be" of a minor engaging in sexually explicit conduct, the statute was vague and overbroad and therefore violative of the First Amendment. Mot. to Dismiss Indictment of Jan. 27, 1999. The district court denied the motion. Order of Jan. 29, 1999.

The district court found petitioner guilty on counts 1-3 (possessing material containing visual depictions the production of which involved the use of a minor engaged in sexually explicit conduct, receiving materials containing child pornography, and distributing materials containing child pornography) and not guilty on count 4 (reproducing child pornography for distribution). Trial Tr. 50.

3. Petitioner's Guidelines sentencing range was 210-262 months' imprisonment, based on a total offense level of 35[4] and a criminal history category of III. Sent. Tr. 60. The court upwardly departed three offense levels, Pet. App. 16, for a Guidelines range of 292-365 months. The court imposed concurrent prison terms of 360 months on petitioner's 18 U.S.C. 2252A(a)(2) (Supp. V 1999) convictions for receipt and distribution under counts 2 and 3. This was the maximum sentence authorized for a recidivist such as petitioner, who had previously been convicted of committing lewd or lascivious acts with a child under 14 years of age, in violation of California law (see PSR 12-13 paras. 59-64,

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[4] Petitioner's total offense level reflected enhancements for distribution of the child pornography he received, for material that portrayed sadistic or masochistic conduct, and for previous exploitation of a minor. Sent. Tr. 77.

17 para. 90).[5] The court imposed a concurrent prison term of 60 months on count 1. Sent. Tr. 76.[6]

The court based the upward departure on several factors. First, the "she[e]r volume" of child pornography involved in this case "was not * * * adequately taken into consideration by the Guidelines." Sent. Tr. 78; see also Judgment 6.02. Second, petitioner "sexually molested numerous children aside from the identified victim in this case." Judgment 6.02; see also Sent. Tr. 78. Third, petitioner "t[ook] advantage" of the Big Brothers Program, the purpose of which is to help children in need of male supervision, for "his own sexual depravity"; by becoming a Big Brother, petitioner "completely thwart[ed] the entire purpose of the program, besmirch[ing] [its] image [and the image of] other [such] programs." Sent. Tr. 78-79; see also Judgment 6.02. Fourth, petitioner was involved in NAMBLA (the North American Man Boy Love Association), an organization that promotes sexual relations between children and adults by supporting a foster home in Thailand that sexually exploits children. Judgment

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[5] 18 U.S.C. 2252A(b)(1) (Supp. V 1999) provides, in pertinent part:

> Whoever violates, or attempts or conspires to violate, paragraph[ ] * * * (2) * * * of subsection (a) shall be fined under this title or imprisoned not more than 15 years, or both, but, if such person has a prior conviction * * * under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 5 years nor more than 30 years.

[6] The court also ordered the forfeiture of items that the parties agreed were subject to forfeiture. Trial Tr. 45-47, 50.

6.02; see also Sent. Tr. 77-79 (petitioner and known pedophiles supported foster homes in Thailand in order to have unlimited access to young boys, as evidenced by a number of Polaroid pictures, provided by Thai officials, depicting petitioner with young Thai boys sitting on his lap). Fifth, petitioner's criminal history category significantly underrepresented the seriousness of his criminal history and the likelihood that he would commit future crimes. Sent. Tr. 78-79; Judgment 6.02. The court also found that petitioner had failed to notify authorities of his change of residence, which he was required to do as a convicted sex offender. Sent. Tr. 78; Judgment 6.02.

The court concluded that a total sentence of 360 months "meets the sentencing objectives of punishment, deterrence and incapacitation, provides an opportunity for [petitioner] to be at least counseled towards rehabilitation during his term of imprisonment, and protects society from [him]." Sent. Tr. 80.

4. On appeal, petitioner made two principal claims. First, he brought facial and as-applied challenges to the "appears to be" language in 18 U.S.C. 2256(8) (Supp. V 1999). Second, he argued for the first time that his prior, plea-based California conviction for committing lewd or lascivious acts with a child under 14 years of age should not have been used to enhance his sentences on counts 2 and 3 because it had not been alleged in his indictment. Petitioner acknowledged, however, that for him to prevail on the latter claim, this Court would have to overrule *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998).

5. The court of appeals affirmed. Pet. App. 1-17. With respect to petitioner's claim that the definition of child pornography under 18 U.S.C. 2256(8) (Supp. V 1999) is vague and overbroad, in violation of the First

Amendment, to the extent that it includes any visual depiction that "appears to be" of a minor engaging in sexually explicit conduct, the court ruled the claim "foreclosed by our recent decision in *United States* v. *Fox*, 248 F.3d 394 (5th Cir. 2001), which upheld the constitutionality of the 'appears to be' language." Pet. App. 6. As for petitioner's claim that the district court erred in enhancing his sentence under 18 U.S.C. 2252A(b)(1) (Supp. V 1999) for a prior conviction relating to sexual abuse, because the prior conviction was not alleged in the indictment, the court pointed out that petitioner "recognize[d] * * * that this issue is foreclosed" by *Almendarez-Torres* v. *United States*, 523 U.S. at 247. Pet. App. 4-5 n.1.[7]

DISCUSSION

1. Petitioner urges (Pet. 6-18) this Court to resolve the circuit conflict over the constitutionality of CPPA's "appears to be" provisions, 18 U.S.C. 2252A (Supp. V 1999), 2256(8)(B) (Supp. V 1999), which apply to petitioner's convictions under counts 2 and 3 of the indictment.[8] While this case was on appeal, the Court

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[7] The court of appeals also rejected petitioner's claims (a) that the evidence of distribution was insufficient (the court reviewed this claim for plain error, because petitioner had failed to make and renew a motion for judgment of acquittal), Pet. App. 6-8; (b) that the district court abused its discretion in departing upward on petitioner's sentences for receipt and distribution of child pornography, Pet. App. 8-16; and (c) that the district court erred in accepting portions of the presentence report to which petitioner had objected without offering any rebuttal evidence, Pet. App. 16-17. Petitioner does not renew those claims in this Court.

[8] The "appears to be" provision does not apply to petitioner's conviction under count 1 for possessing material involving the sexual exploitation of minors, in violation of 18 U.S.C. 2252(a)(4)(B) (Supp. V 1999), because that offense by definition involved "the use

granted the government's petition for a writ of certiorari in *Ashcroft* v. *Free Speech Coalition*, No. 00-795 (argued Oct. 30, 2001). That case presents the same conflict for resolution. Accordingly, the petition in this case should be held pending the Court's decision in *Free Speech Coalition*.

2. Also with respect to counts 2 and 3, petitioner contends (Pet. 19-24) that this Court should overrule *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), which rejected statutory and constitutional arguments that the fact of a defendant's conviction of an aggravated felony must be alleged in the indictment in order for the sentencing court to impose an enhanced sentence under 8 U.S.C. 1326(b)(2) (Supp. V 1999). In the district court, however, petitioner argued only that he lacked notice that his prior conviction would be used to enhance his sentence. Sent. Tr. 57. At the same time, he (1) failed to respond to the government's counterargument (which the district court accepted) that he had received such notice at his initial appearance and arraignment, and (2) could not point to any authority entitling him to such notice in any event. Sent. Tr. 56-58; see also PSR Add. 15 para. 46. Accordingly, petitioner can succeed on his indictment claim only if he demonstrates that the district court's imposition of an enhanced sentence in accordance with *Almendarez-Torres* was plain error. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 732-735 (1993). Petitioner cannot make that showing.

As the court of appeals correctly ruled, Pet. App. 4-5 n.1, under controlling precedent, there is no error in petitioner's sentence. Indeed, petitioner acknowledged

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of a minor engaging in sexually explicit conduct," and the evidence established petitioner's use of actual minors.

as much on appeal. *Ibid.* ("Tampico recognizes, however, that this issue is foreclosed by [*Almendarez-Torres*]."). No decision of this Court holds that, in order for a defendant's sentence to be enhanced above an otherwise governing statutory maximum based on a prior conviction, the fact of the prior conviction must be charged in the indictment. *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), on which petitioner relies, did not overrule *Almendarez-Torres*. *Id.* at 487-490. Moreover, while this Court has held that an error is sufficiently obvious for correction under Rule 52(b) if the error is "plain" by the time of appellate consideration, *Johnson* v. *United States*, 520 U.S. 461, 468 (1997), this Court has never held that an error may be considered "plain" if the Court would have to overrule one of its decisions to establish the error.

This Court has denied other certiorari petitions that presented the claim that *Almendarez-Torres* should be overruled in light of *Apprendi*, where the petitioner did not raise the issue in the district court. See, *e.g.*, *Cho* v. *United States*, No. 00-10301 (Oct. 1, 2001); *Santos* v. *United States*, No. 00-10181 (Oct. 1, 2001); *Rangel-Mendoza* v. *United States*, 121 S. Ct. 2525 (2001); *Galvan-Zapata* v. *United States*, 121 S. Ct. 1739 (2001); *Walker* v. *United States*, 121 S. Ct. 1408 (2001); *Dabeit* v. *United States*, 121 S. Ct. 1214 (2001). There is no basis for a different result in this case.

In any event, in holding in *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," 530 U.S. at 490, the Court expressly declined to disturb the holding of *Almendarez-Torres* that prior convictions may be treated as a sentencing factor. See *id.* at 487-490. The

exception from *Apprendi* for recidivism is sound. Principles of notice and fundamental fairness do not require that an indictment charge, or that a jury find, that a defendant had one or more prior convictions in order to be sentenced to a longer term as a recidivist. A defendant cannot genuinely claim surprise concerning the fact of a prior conviction, because he previously underwent the criminal process that resulted in the conviction. Petitioner claims no genuine surprise here.[9] Nor will a prior conviction ordinarily present any significant factual dispute for a fact-finder to resolve. Petitioner did not claim at sentencing, and does not suggest now, that there is any such dispute concerning his prior, plea-based conviction. The Court observed in *Apprendi* itself that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge [rather than a jury] to find the required fact [that enhances a sentence] under a lesser standard of proof." 530 U.S. at 496. As the Court pointed out in *Jones* v. *United States*, 526 U.S. 227, 249 (1999), "[o]ne basis for th[e] possible constitutional distinctiveness" of the treatment of prior convictions is the presence of the procedural safeguards of "fair notice, reasonable doubt, and jury trial guarantees" in establishing the fact of prior conviction.

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[9] In passing, petitioner asserts that the government did not give him "formal" notice before trial of its intention to seek a sentencing enhancement based on his previous conviction, but he does not deny that the government notified him before arraignment of its intention to do this. Pet. 19. Moreover, as petitioner concedes, the presentence report constituted notice. Pet. 19-20.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending the decision of the Court in *Ashcroft* v. *Free Speech Coalition*, No. 00-795 (argued Oct. 30, 2001), and then disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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